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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BOYD S. LEEDOM, ET AL., Individually and as Chairman and Members of and Constituting the National Labor Relations Board, *Petitioners*

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, A Voluntary Unincorporated Labor Organization, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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v.

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INTEREST OF THE AMICUS CURIAE

Consent for the filing of this brief *Amicus Curiae* was granted by respondent and petitioner; stipulation of consent is being submitted simultaneously herewith.

The National Society of Professional Engineers, hereinafter referred to as the Society, is a non-profit

corporation organized and existing under the laws of South Carolina, with headquarters maintained in Washington, D. C. It was founded in 1934 "as an educational institution [dedicated] to the promotion and the protection of the profession of engineering as a social and economic influence vital to the affairs of men and of the United States." (Extract from Constitution and Bylaws of the Society).

Membership in the Society is restricted to individuals who obtain and retain registration as a Professional Engineer or Engineer-in-Training under the engineering registration laws which are in force in all States, Territories, Possessions and the District of Columbia. The membership of the Society is approximately 46,000. Forty-six state societies of professional engineers are affiliated with the Society and within the state societies there are approximately 365 local chapters.

From its inception, the Society has interested itself in the effect of National laws on the engineering profession and in this connection it has taken a leading part in bringing to the attention of appropriate Committees of Congress, from time to time, data bearing on the impact of Federal legislation upon the engineering profession.

The case before this Court is one of first impression on an aspect of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), which particularly and peculiarly involves all professional engineers who are "employees" under the Act, including many members of the society. It is, in fact, estimated that there are approximately 500,000 engineers in the United States, most of whom are "employees,"

and who will be vitally affected by the disposition of the pending case.

In the interest of protecting and maintaining the separate election rights granted these professional employees by Section 9(b)(1) of the Act, this brief is respectfully submitted.

QUESTION PRESENTED

According to the Petitioners' Brief (p. 2) the question presented to this Court is as follows:

> Whether a federal district court has jurisdiction to set aside a certification issued by the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, upon allegations by the labor organization receiving the certification that the Board failed to comply with statutory requirements in establishing the bargaining unit covered by the certification.

In its appeal to the court below, Petitioner did not contest the interpretation of Section 9(b)(1) as handed down by the district court to the effect that the Board in commingling professional with nonprofessional employees in a voting unit without first conducting a separate election among the professional employees disregarded a mandatory limitation upon its authority. The district court further concluded that the Board's failure to conduct the required election worked irreparable harm to the statutory right of the professional employees. (R. 24-32).

Since the Board failed to object to this proper interpretation by the district court, the reference in its "question presented" to "allegations" by the labor organization that the Board failed to comply with statutory requirements tends to minimize and negate the

finding by the district court, uncontested by the Board, that an express statutory requirement had been violated. Thus, the question before this Court is based upon an accepted conclusion of extra-statutory action, rather than a mere allegation of such act.

We submit, therefore, that the proper question before this Court is whether a federal district court has jurisdiction to set aside a certification issued by the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, when the Board has admittedly failed to comply with the express statutory mandate of Section 9(b)(1) which holds, in effect, that professional employees cannot be commingled with nonprofessional employees in a voting unit without first conducting a separate election among the professional employees to determine whether a majority of them favor inclusion within a unit with nonprofessional employees.

SUMMARY OF ARGUMENT

I

Section 9(b)(1) of the National Labor Relations Act, as amended, provides that the Board shall not decide that any unit is appropriate for purposes of collective bargaining if such unit includes both professional and nonprofessional employees, unless a majority of the professional employees vote for inclusion in such a mixed unit. The Board, however, has interpreted and applied this statutory prohibition to mean that professional employees are entitled to a separate vote regarding inclusion with nonprofessionals only when the professional employees constitute a numerical minority in the proposed unit. Thus, in units which are "predominantly professional" the Board

has denied the professional employees their rights to a separate vote.

Such a construction denies professional employees their rights granted in the Act inasmuch as there always exists the possibility that the nonprofessional votes could actually be the deciding factor in the certification election whether or not the professional employees were numerically predominant. The very characteristics of professional employees differentiating them from other employees, which were recognized by Congress as evidenced by the language of Section 9(b)(1), demand that they alone, without the participation of nonprofessional employees, determine their choice with regard to collective bargaining representation.

There is no discretion on the part of the Board with respect to the application of rights granted professional employees as contained in Section 9(b)(1). Rather, the language demonstrates an express, mandatory prohibition on the Board's authority, the violation of which is subject to direct judicial review in a separate equity proceeding. *Farmer* v. *United Electrical Workers,* 93 U.S. App. D.C. 178, 211 F. 2d 36 (1953), *cert. denied,* 347 U.S. 943 (1954); *DePratter* v. *Farmer,* 98 U.S. App. D.C. 74, 232 F. 2d 74 (1956). Cases which have denied jurisdiction to review the exercise of general discretionary action by the Board are completely distinguishable from the instant case involving the Board's violation of the express language of Section 9(b)(1). *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943), upon which the Board so heavily relies to sustain its position, is neither controlling nor, in fact, in point.

The Board is of the opinion that a ruling unfavorable to its view could result in a situation in which each representation determination could be cast in terms of an alleged excess of statutory authority, with a consequent court review in each instance. Such a position is unwarranted for two reasons. First, the instant situation is based on a specific violation of a definite prohibition on the Board's power rather than on a claim of arbitrary or capricious action under its discretionary authority. Second, a holding in accord with the contention of the *amicus curiae* would go only to a relatively small percentage of Board unit determinations which involve those portions of the Act which impose specific prohibitions on the Board's authority, *i.e.* provisions in Section 9(b) pertaining to professional employees, guards or determinations based on a different unit established by prior Board decision.

The question of judicial review of Federal agency action contrary to specific statutory limitations and prohibitions was before this Court in the recent case of *Harmon* v. *Brucker,* Nos. 80 and 141, October Term, 1957, decided March 3, 1958. In *Harmon,* this Court re-affirmed the well-established proposition that judicial relief is available to one who has been injured by an act of a government official which is in excess of his express powers, and that a claim for such relief may be entertained by the district court. Since the Secretary of the Army in *Harmon* v. *Brucker,* like the Board in the instant case, conceded that statutory powers had been violated, that decision is determinative of the question presently before this Court.

II

The Board contends that there can be no direct judicial review of representation determinations, and that such was the intent of Congress, inasmuch as the Act does provide in Section 9(d) for review of representation proceedings when a certification has become the basis for an unfair labor practice order, and that order is itself before the Court of Appeals for review or enforcement. In this connection the Board would have the Engineers Association engage in activities designed to encourage the filing of an unfair labor practice charge against it, so that by this devious route the Association could then challenge the Board's representation determination. This position, which suggests that the Association defend its rights by deliberately engaging in an illegal act, is diametrically opposed to a basic purpose of the Act "to provide orderly and peaceful procedures for preventing the interference" by management or labor with the legitimate rights of each other. Furthermore, judicial review via the unfair labor practice route to remedy injury of an aggrieved party resulting from the Board's extra-statutory action, is an indirect, costly and delayed means for achieving what the courts have held could be accomplished by a direct equity proceeding.

III

Since the Board has sought to justify its position on the jurisdictional issue (which is the only issue before this court) by reference to its belief that its interpretation of Section 9(b)(1) has a rational basis, the *amicus curiae* is compelled to bring to the attention of this Court the propriety of the district court's inter-

pretation of Section 9(b)(1) and the defects inherent in the Board's claim.

A literal reading of the unambiguous language of Section 9(b)(1) admits of only one interpretation—that a unit is not appropriate if it includes both professional employees and nonprofessional employees unless the professional employees first vote to include themselves in the heterogeneous unit. There is nothing in this language which suggests that the Board may find some exceptions to the clear mandate laid down by Congress. Even though the language of this section is precise enough in its prohibition, its legislative history further reinforces the interpretation gleaned from a literal reading.

The Board's "predominantly professional" theory, under which it seeks to justify the inclusion of nonprofessional employees with professional employees without regard to the separate voting rights of the professionals, constitutes an arrogation unto itself of the complete right to determine the limitations of the policy which it has established. There are no standards, limitations or controls except those it may choose to apply to itself. Neither a literal reading nor reference to legislative history supports in any manner the Board's position that separate elections for professional employees are required only when they constitute a minority in the proposed bargaining unit.

ARGUMENT

I

FEDERAL DISTRICT COURTS HAVE JURISDICTION TO REVIEW AND SET ASIDE BOARD ACTIONS IN VIOLATION OF EXPRESS STATUTORY PROHIBITIONS

A. The Board's violation of an express statutory prohibition will, if not corrected by the courts, effectively deny professional employees the rights granted in the Act.

Section 9 (b)(1) of the National Labor Relations Act, as amended, imposes an express statutory prohibition on the Board that a unit for purposes of collective bargaining is not appropriate if it includes both professional and nonprofessional employees, unless a majority of the professional employees vote for inclusion in such a mixed unit.[1] The inherent and basic principal of the statutory right of self-determination confined to professional employees is that the professionals, due to different backgrounds, education, professional viewpoint, ethical standards, etc., are entitled to decide their acceptance or rejection of collective bargaining representation, or the choice of a representative if they decide for representation, uninfluenced or controlled by those from essentially different backgrounds and viewpoints, *i.e.* the nonprofessional employees.

The historical background of the Board's neglect of this precise statutory langauge, and the establishment of its "predominantly professional" theory leading to the instant case, began with *Continental Motors Corp.*,

[1] Section 9(b)(1) provides that: "*Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes [collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *."

77 NLRB 345 (1948). In *Continental Motors, supra,* there were approximately 90 eligible voters in the "professional" group. Of 85 votes cast, 42 were for the petitioning union and 39 were aganist the petitioner (4 votes were challenged). The employer had challenged the professional status under the Act of nine employees in the blueprint room. But the Board rejected the employer's challenge, stating that it was not necessary to pass upon the professional status of the nine employees because the bargaining unit was composed *predominantly* of professional employees. In view of the closeness of the vote, it may very well have been the case that a majority of the *professional* employees voted against the petitioning union, and that the wishes of the majority were frustrated by the vote of the employees in the blueprint room, whose professional status was not determined by the Board, and who may well have been found to be nonprofessional employees within the definition of Section 2(12) of the Act.

A practical illustration of the way in which the Board's action could deny professional employees their separate rights under the "predominantly professional" theory is afforded by a representation election at The Texas Company, Westville, New Jersey. NLRB Case 4-RC-3024. At this election, which was held September 7, 1956 among all professional engineers and chemists, 15 votes were cast for the petitioner, Association of Professional Engineers and Chemists (independent); and 15 against. The association was denied certification as the bargaining representative for failure to achieve the necessary majority vote. If the above-mentioned factual situation were slightly altered to add one more eligible vote to the 30

votes cast, and if that one vote were cast by an admittedly nonprofessional employee, there would be the anomalous situation in which the single vote of a nonprofessional employee could decide the collective bargaining fate of a group *more* than "predominantly professional," since such a single nonprofessional vote would effect a majority for the successful side.

Thus, in spite of the Board's contention that professional employees need be granted separate election rights only when the professional employees constitute a minority in the unit deemed appropriate, it can be seen that since professional employees can and do differ among themselves regarding representation for collective bargaining or the choice of a representative, the votes of nonprofessional employees could turn the tide in deciding upon the question of bargaining representation for the professional employees.

In any instance wherein nonprofessionals are included in a unit with professional employees, without the consent of the professionals, there exists the possibility that the nonprofessional votes could actually be the deciding factor in the certification election whether or not the professional employees were numerically predominant.

Such a result was not contemplated by Congress when Section 9(b)(1) was enacted. The very characteristics of professional employees differentiating them from other employees demand that they, and they alone, determine their choice with regard to collective bargaining representation.

Any system or theory which permits the commingling of nonprofessional employees without the consent of the professionals, then, denies the professional em-

ployees their statutory right to decide their own fate without the participation of nonprofessional employees.

B. Where the Board has violated a specific statutory prohibition, the courts have exercised jurisdiction in equity proceedings.

It has been consistently held that where the Board has violated clear, mandatory statutory language, courts have assumed jurisdiction to review such actions in a separate equity proceeding.

In *Farmer* v. *United Electrical Workers*, 93 U.S. App. D.C. 178, 211 F. 2d 36 (1953), *cert. denied*, 347 U. S. 943 (1954), which involved a finding that the Board's investigation into the truth of non-Communist affidavits filed by certain union officers was beyond the Board's statutory authority, the Court of Appeals held:

> It is clear enough that review of Board action in the Court of Appeals is limited to unfair labor practice proceedings under Sec. 10. But the question whether action, preliminary to such proceedings and plainly beyond the scope of statutory authority, may be reviewed by the District Court in the exercise of its equity power was twice reserved by the Supreme Court to await 'the required showing of unlawful action by the Board and resulting injury * * * whether by way of departure from statutory requirements or from those of due process of law.' We think the required showing is presented in these cases.

In the later case of *DePratter* v. *Farmer*, 98 U.S. App. D.C. 74, 232 F. 2d 74 (1956), it was again recognized that Board proceedings are reviewable in an original equity suit in the district court if there is a

showing of unlawful action by the Board "by way of departure from statutory requirements or from those of due process." While the Court in *DePratter* found that the Board's determination of an appropriate unit consisting of full-time and part-time production workers was within its statutory authority, it was noted, however, that the approval of such a unit was "within the Board's discretion."

The commingling of professional with nonprofessional employees in a voting unit without first affording the professionals separate voting rights in all cases constitutes a clear departure from express statutory requirements, and accordingly, under the principle announced in the above-cited cases, the district court has jurisdiction to directly review such Board action in a separate equity proceeding. The conclusion is inescapable, therefore, that proceedings of the Board are directly reviewable by separate equity suit in the district courts if the Board has violated an express statutory prohibition. Cases cited in the Board's brief wherein the Courts have refused to review Board determinations under the grant of general discretionary authority, which authority was found not to have been abused, are thus distinguishable on this point.[2]

Cases wherein the Board is granted and exercises general discretionary authority in unit determinations, jurisdiction for the review of which are denied to the district courts, are completely distinguishable from the instant case involving the Board's action under Section 9(b)(1). Under Section 9(b)(1), the Board has no discretion; rather, the power of the Board with re-

[2] See *Millis* v. *Inland Empire District Council*, 79 U.S. App. D.C. 214, 144 F. 2d 539 (1944), *aff'd*, 325 U.S. 697 (1945).

spect to representation determinations involving professional employees is clearly and explicitly limited by the proviso "That the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *." (emphasis added).

The Board's reliance on this Court's decision in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943) is clearly not controlling, nor, in fact, in point to the instant case. There, Section 2, Ninth of the Railway Labor Act, which the Board says is "analogous to Section 9 of the National Labor Relations Act," (Board's brief, p. 27) refers to "* * * craft or class for the purposes of this Act" giving the administrative agency an obvious wide discretion to determine the appropriate craft or class in which the election should be held. This authority is similar to the broad discretionary grant authorized the Labor Board in the opening language of Section 9(b). But there the so-called "analogy" stops. The Railway Labor Act does not go on, as does the 9(b)(1) proviso, to stipulate additional specific limitations and prohibitions over and above the general grant of discretionary power. Thus, the Board's position that *Switchmen's* is precisely in point to the instant case is totally without merit. The foreclosure of judicial review of discretionary administrative determinations, concluded in the *Switchmen's* case, cannot be extended to preclude court review of administrative action which constitutes a clear departure from a statutory prohibition.

The language of this Court in that case[3] supports the position of the respondent:

> * * * Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end, * * *

Congress in the National Labor Relations Act also created a right and decided upon the method for its protection and "selected the precise machinery and fashioned the tool which it deemed suited * * *," in a different manner. We refer, of course, to the right granted professional employees under the Act and to the fact that the Board cannot lawfully include professional employees and nonprofessional employees in the same unit unless the professional employees by separate vote decide to be included in the unit with nonprofessional employees.[4]

The Board's fear that a ruling unfavorable to its view could result in a situation wherein virtually "* * * every Board determination in each of the numerous representation proceedings processed by the Board could be cast in terms of an alleged excess of statutory authority, thereby completely frustrating Congress's intention to limit the reviewability of such proceedings," (Board's brief, p. 26) is not justified on two grounds. First, the original equity suit in the present case did not rest on a claim of arbitrary

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[3] 320 U.S. at 301.

[4] The Board itself recognized the existence of this right and the machinery fashioned to protect it when it stated: "Self-determination elections as to the inclusion of professional employees in units with nonprofessionals are mandatory under section 9(b)(1) of the act." (Nineteenth Annual Report of the NLRB, p. 42).

or capricious action under the Board's discretionary power over unit determinations under the general authority of Section 9; rather it rested on a specific violation of a definite prohibition on the Board. Second, a holding that the Board's action contrary to a specific prohibition is reviewable by the Court would go only to those portions of the Act which impose specific prohibitions on the Board's authority, such as in the case of professional employees (Section 9(b)(1)); a determination based on a different unit established by prior Board decision (Section 9(b)(2)); or the inclusion of guards in a unit with other employees (Section 9(b)(3)). These specific prohibitions are explicit and few in number, involving a relatively small percentage of Board unit determinations, and, therefore, could not reasonably be expected to result in the flood of court challenges which the Board appears to contemplate.

In any event, there is no warrant for denying judicial corrective action where an administrative agency acts contrary to the specific limitations and prohibitions which Congress has seen fit to impose on it.

This very point was concisely expressed by this Court in the recent decision of *Harmon* v. *Brucker*, Nos. 80 and 141, October Term, 1957, decided March 3, 1958. There this Court held that the district court possessed jurisdiction to review certain discharges granted to two soldiers by the Secretary of the Army, upon allegations that the Secretary had exceeded his statutory authority. In the course of its decision, this Court said:

> Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. [Citations] The District Court had not only

> jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries. [Citations]

The *Harmon* decision applies squarely to the instant case. Here, the district court assumed jurisdiction and properly concluded that it had jurisdiction. In addition the district court construed the express language of Section 9(b)(1) to the effect that the Board had exceeded its powers because it disregarded an express limitation upon its authority with the result that irreparable harm was worked upon the statutory right of the respondent. Further, the Board's extra-statutory action does not constitute the exercise of its administrative discretion.

In the *Harmon* case, as in the instant case, there was a concession that statutory powers had been exceeded and that the basic question to be decided was concerned with jurisdiction to review.

It is essential to note that the principle of the *Harmon* case was applied in the face of an underlying statute which provided in effect that the findings of the Secretary of the Army would be final. There is no similar provision in the National Labor Relations Act, as amended, with respect to representation determinations. In order to sustain its position that Congress intended all Board representation rulings to be final, ex-

cept to the limited extent permitted by Section 9(d), the Board relies heavily on legislative history. We submit, therefore, that if the *Harmon* principle of judicial review of extra-statutory acts can be applied in spite of an obvious limitation on court review in the underlying statute, then the same principle can be applied with even more vigor in the instant case where the underlying statute is silent on the question of court review of representation determinations (except to the limited extent in Section 9(d)).

According to the Board's brief (footnote 23, p. 33), the Administrative Procedure Act of 1946 (60 Stat. 237, 5 U.S.C. Sec. 1001) cannot be utilized by respondent as an avenue of relief inasmuch as the Act is inapplicable to (1) statutes which preclude judicial review, or (2) agency action which is by law committed to agency discretion. This contention would have merit if the two prerequisites for inapplicability were present. However, the presence of neither can be sustained. Representation determinations by the Board in cases involving professional employees do not fall into the area of agency discretion. In addition, the inclusion in the National Labor Relations Act of explicit procedure for review of Board actions through the charge of an unfair labor practice, does not support the contention that direct review is thereby precluded in other situations, e.g. where the agency violates a definite prohibition of its powers.

Contrary to the Board's position, respondent does have a basis for an independent suit by virtue of Section 10 of the Administrative Procedure Act which specifically provides, *inter alia*, for judicial review of agency action or decisions "in excess of statutory juris-

diction, authority, or limitations, or short of statutory right; * * *."[5]

II

JUDICIAL REVIEW THROUGH THE "UNFAIR LABOR PRACTICE" PROCEDURE OF BOARD CERTIFICATIONS WHICH VIOLATE EXPRESS STATUTORY LANGUAGE IS NOT PROVIDED BY THE ACT, NOR IS IT A PRACTICAL SOLUTION TO REMEDY INJURY TO THE AGGRIEVED PARTY

The Act itself, and its legislative history, shows that the unfair labor practice procedure and remedies, upon which the Board so heavily relies as a panacea, was to operate on and against the parties to collective bargaining by specifying certain practices as improper and providing enforcement machinery to prevent the commission of such prohibited practices. The point in issue in this case is quite distinct from this, in that the restriction operates against the Board, not against the parties. It was neither contemplated nor intended that a prohibition on the Board should be enforced by the devious route of attaching the prohibition on the parties.

The detailed procedure as set out in the Board's brief (footnote 12, p. 22) by which the Engineers Association could challenge the Board's representation determination as erroneous, is at best an expensive, lengthy and indirect method of accomplishing what the courts have held could be achieved by direct judicial review.[6]

Further, the alternative procedure of securing a test of the certification through the unfair labor practice route, suggested by the Board, is unique, if not startling. The Board, in effect, suggests that the Engineers

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[5] See *NLRB* v. *Glen Raven Knitting Mills, Inc.*, 235 F. 2d 413 (4th Cir. 1956).

[6] See *Farmer* v. *United Electrical Workers, supra.*

Association defend its rights by deliberately engaging in an illegal act. The suggested avenue is all the more disconcerting in the face of the Congressional language in Section 1 of the Act that "neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest," and, later, "It is the purpose and policy of this Act, * * * to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." The Board now says, in effect, that the very practices which the Act proscribes should be adopted by one of the parties as an admittedly artificial means of protecting the specific right granted in the Act. For an administrative agency to recommend a deliberate violation of the Act it is charged with enforcing is a novel concept of administrative law.

Even if this concept be accepted, there is no assurance that after years of litigation the union would finally have its rights declared in final effective form. If the Engineers Association makes a demand on the employer to bargain for only a part of the certified unit, and the employer refuses, as he logically must refuse, there is no incentive for the employer to bring an unfair labor practice charge. He has lost nothing. The nine employees whom the Engineers Association refuses to represent may, the Board suggests, bring the charge. As a practical matter and as concluded by the court below (R. 39), it is exceedingly unlikely that nine employees in such a situation would undertake a lengthy and expensive procedure. The Board, however, is of the opinion that the conclusion of the

court below is unwarranted, particularly insofar as the filing of charges by the nine nonprofessionals is concerned.[7]

The Board's line of reasoning and suggestions in connection with the "unfair labor practice" avenue to remedy an erroneous representation determination says nothing more than that Congress may enact limi-

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[7] The Board has sought to justify its inclusion of the nine nonprofessional employees in the unit with the professionals on the practical ground that they have a close community of interest with the professional employees, and if they, as a "small fringe group," were excluded from the professional unit there would be no satisfactory method of protecting their rights under the Act. This solicitous concept is untenable for two reasons. First, the employee categories in dispute are engineer order service, engineer test record, and engineer contact. Having been found by the Board not to be within the professional employee definition (Section 2(12)), the employees in these categories could properly be designated as "technicians," a classification which has been established and well-recognized by the Board over the years. Accordingly, the Board could include the technicians in a clerical unit, or allow them to remain in the unit represented by the Intervenor (Buffalo Salaried Employees Association).

Second, the Board contended that the alternative of establishing a separate unit composed only of the few technicians would not be appropriate because it is doubtful that the technicians would enjoy equality of bargaining power between employers and employees. It is noted, however, that this argument is inconsistent with previous Board decisions which found even smaller units to be appropriate. In a case in which it was sought to establish three bargaining units with a total of only eight employees, the Board rejected the Employer's objection, stating: "• • • a comparatively small number of employees in a proposed unit is not a factor of special relevancy where the requested group could constitute an appropriate unit by other Board standards." *McCarthy Chemical Company*, 98 NLRB 1084, 1085 (1952). Even more persuasive of the unsoundness of the claim made by the Board is its prior decision that "• • • it is well settled that two employees may constitute an appropriate unit." *Kentucky Synthetic Rubber Corp.*, 95 NLRB 453, 456 (1951).

tations, prohibitions, restrictions and bars to no avail; that an administrative agency may thwart the clear Congressional intent as expressly stated in the language of the statute.

Furthermore, the parties could be involved in costly litigation involving a long delay, and possible appeal to the Supreme Court, all of which could consume two or more years, during which period their rights under the Act would be in suspension. It is interesting to note that the Board itself recognized that even under a proposed amendment which would permit direct review of representation proceedings, it would take a year to obtain an Appellate determination.[8] If direct equitable review of Board action, according to the Board itself, could consume a year, is it not reasonable to assume that the more involved "unfair labor practice" procedure would take up twice as much or more time? Such a policy as the Board now suggests is contrary to the policies of the Act for the "orderly and peaceful" (Section 1) settlement of labor disputes.

Since the language of Section 9(b)(1) of the Act is so clear, and the Board's derogation of prohibitory language likewise so clear, the parties should have access to direct equitable relief without going through

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[8] Hearings Before the Senate Labor Committee on S. 1000, *et al.*, 76th Cong., 1st Sess. pp. 584-585 where the Board stated: "Proceedings for review of a Board's certification would require from 6 months to a year in the circuit court of appeals. Thereafter the losing party would have 3 months in which to apply for certiorari to the Supreme Court, and if certiorari were granted, several more months would pass before final decision could be rendered. * * * All in all, it can be conservatively estimated that, on the average, it would take a year to obtain review of a Board certification."

the unnecessary motions of encouraging an unfair labor practice charge.

III

THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY SUPPORTS THE RIGHT OF PROFESSIONAL EMPLOYEES TO SEPARATE ELECTIONS REGARDING INCLUSION WITH NONPROFESSIONAL EMPLOYEES IN ALL REPRESENTATION ELECTIONS

A. The statutory language is clear.

Section 9 (b) (1) of the Act is precise and exact in imposing an absolute prohibition upon the Board in the determination of appropriate units. The statutory language admits of only one interpretation—that a unit is not "appropriate" if it includes both professional employees and nonprofessional employees unless the professional employees first vote to include themselves in the heterogeneous unit. And there is nothing in the language which indicates, however remotely, that the Board may find some exceptions to the clear mandate laid down by Congress.

It is of some significance that the Board's *Thirteenth Annual Report,* for the fiscal year ended June 30, 1948, the first annual report following the 1947 amendments to the Act, said of the new professional separation provision:

> This amendment substantially codifies the Board's prior practice of placing professional employees in separate bargaining units, or excluding them from units of other employees wherever the record in a particular case indicated that the professional personnel desired to be segregated. But it removes the matter from the Board's discretion *and permits of no exceptions to the general rule.* (*Thirteenth Annual Report of the NLRB,* p. 40, emphasis added.)

In spite of this clear manifestation of Congressional intent, which the Board has previously recognized, the Board in its brief in the instant suit (p. 34) contends that "although a literal reading of this language [referring to Section 9(b)(1)] may support the conclusion that the limitation was intended to apply *whenever* the Board intended to group professional employees in the same unit as nonprofessional employees, the legislative history of the proviso shows that it had a narrower purpose." In other words, the Board claims that regardless of the fact that the language is clear, we must nevertheless refer to its legislative history. Prior decisions of this Court indicate unequivocally that such a position is completely without merit.

As Chief Justice Vinson said in *Ex Parte Collett*, 337 U.S. 55 (1948),

> there is no need to refer to the legislative history where the statutory language is clear. * * * This canon of construction has received consistent adherence in our decisions. [citing cases]

Justice Rutledge said in *Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1944):

> The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance may furnish dubious bases for inference in every direction.

And in *U. S.* v. *American Trucking Ass'ns*, 310 U.S. 534 (1939), Justice Reed declared:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in

and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.

Without belaboring this point, we believe it sufficient to state that since the 9(b)(1) proviso is so definite and unambiguous on its face, admitting of only one interpretation of the intent of Congress with respect to the rights of professional employees in representation elections, any recourse to legislative history or other extrinsic factors is completely irrelevant.[9]

B. The legislative history of Section 9(b)(1) supports total separation of professional employees in all circumstances.

Although we have pointed out above that a literal reading of Section 9(b)(1) sufficiently indicates the intent of Congress, we are nevertheless constrained to discuss the legislative history of 9(b)(1), which in our opinion is completely consistent with the interpretation gleaned from a literal reading of the proviso, inasmuch as the Board has brought this matter before this Court even though frankly admitting that the merits of the statutory interpretation of 9(b)(1) are not at issue. (Board's brief, p. 34).

The principal proponents for the inclusion of provisions in the amended Act dealing specifically with the rights of professional employees were a group of national engineering societies, including the *amicus curiae*, which appeared before the Congressional committees as a panel. (Hearings Before Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess.,

[9] For additional Supreme Court cases applying the "literal" rule of statutory construction, see: *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, *Caminetti* v. *U.S.*, 242 U.S. 470, and *U.S.* v. *Public Utilities Commission*, 345 U.S 295.

part 3, p. 1702 (1947); Hearings Before House Committee on Education and Labor, 80th Cong., 1st Sess., vol. 5, p. 2779 (1947)). The gist of the testimony was that the National Labor Relations Board had swept professional employees into collective bargaining units overwhelmingly composed of nonprofessional employees and that such forced amalgamation foreclosed a proper determination of the desires of the professional employees in matters of collective bargaining. It was made clear in the testimony that there was no intent to prohibit collective bargaining rights for professional employees, but that it was desired that professional employees be entitled as a matter of right to a separate determination of their wishes upon collective bargaining questions.

The major burden of the testimony was that professional employees have an essentially different background and outlook from nonprofessional employees, and the intended distinction between the two was stated in testimony in the following language: "Wherever the term 'non-professional' is used in the following discussion, reference is made to employees whose duties do not fall within this definition." (Sec. 2, S. 360, 80th Cong., 1st Sess.; now Sec. 2 (12) of the Act.) Thus, the principal sponsors of the provisions of the Act now before the Court had in mind a complete and total distinction between the professionals and nonprofessionals. This intention is further confirmed by one of three specific points recommended to Congress for correction of the problem: "(2) No professional employee, or group of professional employees, desiring to undertake collective bargaining with an employer, should be forced to *affiliate with*, or become members of, any bargaining group *which includes non-profes-*

sional employees, or to submit to representation by such a heterogeneous group or its designated agents." (Emphasis added)

It is correct that the principal purpose of Section 9 (b) (1) was to protect professional employees from being engulfed by a more numerous group of nonprofessional employees. That was the major reason for seeking corrective legislation and was stressed in the testimony of the National engineering societies. The point in issue involves the mechanism which Congress adopted to meet this problem.

It is the contention of the *amicus curiae* that Congress adopted a method of solution along the lines recommended by the National engineering societies, i.e., that the Board be prohibited from including *any* nonprofessionals with professionals in a voting unit.

Thus, while the Board stressed in its argument to the district court that the *purpose* of the provision in the House bill (H.R. 3020, 80th Cong., 1st Sess.) was to prevent "distinguishable *minorities*" from being "forced * * * into bargaining units against their will," the House Conference Report, explaining the *method* to be followed, states that "the Board cannot include both professional employees and employees who are not professional employees in the same unit, unless a majority of the professional employees vote for inclusion therein." (1 Legislative History of the Labor Management Relations Act, 1947, Govt. Print. Off., 1948, p. 551.) Opponents of the professional separation provision understood that total separation would be required under the House bill. Representative Klein, a member of the House Committee, for example, stated on the House floor, "Any splinter group, how-

ever small, must be separated if an 'interested person' desires it, and if the group is 'distinguishable.'" (1 Leg. Hist. 654.) Professional employees are admittedly "distinguishable" under the Act in view of Section 9 (b)(1) and the definition of "professional employee" (Sec. 2(12)).

Likewise, the Senate Committee Report described the *method* to be employed by the Board as one in which "* * * the Board is required to afford such groups [professional employees] an opportunity to vote in a *separate* unit to ascertain whether or not they wish to have a bargaining representative of their own." (1 Leg. Hist. 417, emphasis supplied.) The minority report of the Senate Committee also noted that the language adopted was a "* * * restriction on the discretion of the Board * * *" and would "* * * *bar* the Board from finding appropriate a unit of both professional and nonprofessional employees unless a majority of the professionals voted for inclusion in the unit." (1 Leg. Hist. 472, emphasis supplied.)

C. There is no rational basis for the "predominantly professional" theory as applied by the Board in certification cases involving professional employees.

We fully realize that the question of the propriety of the district court's interpretation of Section 9(b)(1) is not before this Court. However, since the Board has sought to justify its position on the jurisdictional issue by reference to its belief that its "interpretation of Section 9(b)(1) has a rational basis," we are compelled to bring to the attention of this Court the defects inherent in the Board's claim.

The Board's "predominantly professional" theory under which it feels justified in including nonprofes-

sional employees with professional employees in a voting unit without regard to the desires of the professionals where the professionals are numerically superior, constitutes an arrogation unto itself of the complete right to determine the limitations of the policy which it has established. Since there is nothing in the Act authorizing the application of the "predominantly professional" theory, it follows that there are no standards, limitations or controls on the Board as to how far it may go in applying its doctrine, except those it may choose to apply to itself. Presumably the Board could hold a voting unit "predominantly professional" if fifty-one percent of the employees in that unit were found by the Board to be within the professional definition. We think it is clear that Congress did not intend, and did not grant the Board such power in the light of the deliberate decision to allow professional employees to choose for themselves.

The Act cannot be construed to have intended separate elections for professional employees only when they constitute a minority in a proposed bargaining unit. Section 9(b)(1) is completely silent with regard to "minority" or "majority."

It is clear that the Board has not adopted any standards or specified any minimum or maximum percentages to govern the question of how far it may go in including nonprofessionals in professional voting units. Since the inception of the "predominantly professional" theory in *Continental Motors, supra,* (in which nonprofessionals constituted 10%, the Board has permitted widely varying percentages of nonpro-

fessionals to be included without affording the professionals a separate vote on this point.[10]

However, in a unit determination situation which involved seven professional employees and six nonprofessional employees, the Board did recognize the requirement of the Act which is contended for by the *amicus curiae*: "The Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with nonprofessional employees, unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, we must ascertain the desires of the professional employees as to inclusion in a unit with non-professional employees." *Swift & Co.*, 98 NLRB 746, 747 (1952).

The Board contends, in essence, that Congress has acquiesced in the Board's construction of Section 9(b)(1) in the *Continental Motors* case, *supra*, since being apprised of such construction, Congress has neither criticized nor undertaken to modify it.[11] Such a contention is without foundation. Congress has not

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[10] In the following cases, the Board permitted the inclusion of nonprofessional employees in the percentages indicated without affording the professionals a separate vote to determine their desires as to inclusion with nonprofessionals: *Westinghouse Electric Corp., Lamp Div.*, 80 NLRB 591 (1948)—22.2%; *E. R. Squibb and Sons*, 83 NLRB 792 (1949)—11.1%; *Boeing Airplane Co.*, 86 NLRB 368 (1949)—26.0%; *Westinghouse Electric Corp. South Philadelphia Works*, 89 NLRB 8 (1950)—7.2%; *Schwarz Laboratories, Inc.*, 89 NLRB 930 (1950)—29.1%; *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395 (1951)—31.5%; *Potomac Electric Power Co.*, 99 NLRB 219 (1952)—17.5%; *Miller Electric Co.*, 101 NLRB 1014 (1952)—7.5%; *Standard Oil Co.*, 107 NLRB 1524 (1954)—7.0%.

[11] At Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147-1148, June, 1948, Chairman Paul M. Herzog said of the *Continental Motors* case: "I am not perfectly sure that the decision was 100 percent good

dealt with the representation aspects of the Act since its passage. Mere presentation to a Congressional committee of administrative interpretations, without any specific or implied endorsement of such interpretation on the part of Congress, cannot be deemed Congressional acquiescence in the interpretation. Silence on the part of the legislative body does not amount to assent to every interpretation placed upon the Act by the Board.[12]

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law. I think it was more than 50 percent good law, and extremely good administrative practice. It seemed to us that the intent of Congress was to give professionals a chance to get out of nonprofessional units, and not to give a few nonprofessionals a chance to tangle things up for professionals. I think that was the basic reason for the decision."

[12] *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361 (1950), upon which the Board relies, involved an exercise by the Board of its discretionary authority which had been followed for many years prior to the 1947 amendments, and which had been sustained in two court cases. The practice of the Board was considered by Congress in the course of adopting the 1947 amendments. And, as this Court said, "Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court be affirmed.

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